

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITEDHEALTH GROUP, INC.,
Individually, and on behalf of all others
similarly situated,

Plaintiff,

v.

GLAXOSMITHKLINE, LLC,
GLAXOSMITHKLINE HOLDINGS
(AMERICAS) INC.,

Defendants.

C.A. No. _____

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1331, 1332(d), 1441, 1446, and 1453, Defendants GlaxoSmithKline LLC and GlaxoSmithKline Holdings (Americas) Inc. (collectively, “GSK”), by their undersigned attorneys, hereby remove this putative class action from the Philadelphia County Court of Common Pleas to the United States District Court for the Eastern District of Pennsylvania. Because this lawsuit is brought on behalf of a putative class, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d). As grounds for removal, GSK states as follows:

1. On December 23, 2010, Plaintiff UnitedHealth Group, Inc. (“UHG”) filed (1) a Praecipe to Issue Writ of Summons, and (2) Pre-Complaint Interrogatories (“Interrogatories”) in the Philadelphia County Court of Common Pleas, in the civil action styled *UnitedHealth Group, Inc. v. GlaxoSmithKline LLC*, December Term 2010, Case No. 2871. A true and correct copy of the Praecipe and Interrogatories is attached hereto as Exhibit A.

2. On January 28, 2011, GSK timely removed this action to the United States District Court for the Eastern District of Pennsylvania.

3. On April 18, 2011, the United States District Court for the Eastern District of Pennsylvania remanded the action to the Philadelphia Court of Common Pleas on the grounds that removal was premature because UHG had only filed a writ of summons and pre-complaint interrogatories.

4. Upon remand, UHG filed a motion to compel responses to its pre-complaint discovery, and at oral argument on the motion, held May 16, 2011, UHG reaffirmed on the record that it is bringing its claims as a class action and specified its four causes of action against GSK. A true and correct copy of the portion of the argument transcript ("Tr.") containing these record statements is attached as Exhibit B. (Tr. 4)

5. UHG's claims are for recovery of health care expenses paid for treatment of conditions allegedly caused by GSK's prescription medications Avandia and Paxil as follows: (1) subrogation; (2) reimbursement (which UHG conceded to be a claim against an insured, and not GSK); (3) under the Employee Retirement Income Security Act of 1974 ("ERISA"), § 502 (a)(3) (codified at 29 U.S.C. § 1132 (a)(3)); and (4) under the Medicare Secondary Payer Act ("MSP Act"), 42 U.S.C. § 1395y(b)(5). (Tr. 4-11)

6. This Court has subject matter jurisdiction over UHG's action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) ("CAFA"), and exclusive federal jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"), § 502 (a)(3) (codified at 29 U.S.C. § 1132 (a)(3)); 28 U.S.C. § 1331 (federal question).

I. THE PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED

7. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b).

UHG first specified its causes of action on May 16, 2011.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1441(a), because the Philadelphia County Court of Common Pleas is located within the geographic boundaries of the United States District Court for the Eastern District of Pennsylvania. 28 U.S.C. § 118(a).

9. In accordance with 28 U.S.C. § 1446(d), GSK will file promptly a copy of this Notice of Removal with the Philadelphia County Court of Common Pleas. GSK has served all parties with a copy of this Notice of Removal.

II. THIS COURT HAS FEDERAL JURISDICTION UNDER THE CLASS ACTION FAIRNESS ACT

10. This Court has subject matter jurisdiction over this action pursuant to CAFA. *See* 28 U.S.C. §§ 1332, 1453, 1711-15.

11. This action is not one described in 28 U.S.C. §§ 1332 or 1453 as non-removable, and no statutory exception to CAFA jurisdiction applies in this case. *See* 28 U.S.C. §§ 1332(d)(4)(A), (d)(4)(B).

12. Under CAFA, federal courts have original jurisdiction over class actions where the putative class contains at least 100 members; any member of the putative class is a citizen of a State different from that of any Defendant; and the amount in controversy exceeds \$5 million in the aggregate for the entire class, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(d)(2), (d)(5)(B), and (d)(6).

13. This action satisfies all requirements for federal jurisdiction under CAFA.

A. Numerosity Exists

14. The putative class contains at least 100 class members. UHG has commenced this class action against GSK on behalf of itself and all “similarly situated health plans.” (Tr. 4, 45, 62). According to the American Association of Health Plans, of which UHG is a member, there are at least 1,300 health plans in the United States. CAFA’s requirement of class numerosity is therefore satisfied. *See* 28 U.S.C. § 1332(d)(5)(B).

B. Minimal Diversity of Citizenship Exists

15. Under CAFA, but not under provisions of the United States Code addressing diversity of citizenship in actions not considered class actions, *i.e.*, 28 U.S.C. § 1332(a), the citizenship of an LLC is that of “the State where it has its principal place of business and the State under whose laws it is organized.” *See Steel City Group v. Global Online Direct, Inc.*, 2006 U.S. Dist. LEXIS 83622, at *5 (W.D. Pa. Nov. 16, 2006) (quoting 28 U.S.C. § 1332(d)(10)). GSK is an LLC formed under the laws of Delaware.¹ For purposes of CAFA, GSK has its principal place of business in Philadelphia, Pennsylvania.

16. There is diversity of citizenship because UHG is a Minnesota corporation with its principal place of business in Minnetonka, Minnesota. (*See* UnitedHealth Group, Inc., Annual Report (Form 10-K), at 1 (Feb. 10, 2010)).

C. The Amount in Controversy Is Satisfied

17. The amount in controversy exceeds \$5 million in the aggregate for the entire class, exclusive of interest and costs.

¹ The sole member of GSK LLC is GlaxoSmithKline Holdings (Americas) Inc., a Delaware corporation with its principal place of business in Wilmington, Delaware.

18. Private insurers such as UHG provide insurance coverage for approximately two-thirds of the population of this country. (See Press Release, United States Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2009*, Sept. 16, 2010 (noting that 194.5 million Americans have private insurance)).

19. Upon information and belief, a substantial percentage of the claimants who filed suit in the Avandia litigation and the Paxil Pregnancy litigation are privately insured.

20. UHG's claims for treatment costs in connection with Avandia exceed \$5 million. UHG asserted in connection with its pursuit of discovery that its and the other health plans' claims are for heart attacks, strokes, and other complications arising from the use of Avandia. The medical costs of hospitalization associated with these conditions are substantial and can easily exceed \$10,000 per person. In 2004, the Department of Health and Human Services concluded that the mean cost of hospitalization alone was \$16,200 for heart attack patients, \$11,100 for stroke patients, and \$9,400 for CHF patients. (See Dep't of Health and Human Servs., Agency for Healthcare Research and Quality, *Hospital Stays for Circulatory Diseases, 2004*).

21. Even if treatment costs totaled \$10,000 per person, the \$5 million amount in controversy would be met if there were only 500 Avandia claimants nationwide who experienced heart attacks, strokes, or other complications and who were covered by UHG or any of the putative class members. Given that UHG intends to bring a putative class action involving at least 100 other health plans, each of which has hundreds, if not thousands of members, the number of Avandia claimants to whom UHG is asserting that it is subrogated will be much higher.

22. In addition, there are over 800 claimants who have filed suit in the Paxil Pregnancy litigation. These claimants' suits are for various prenatal heart defects, ranging from mild to severe. Treatment of birth defects can cost hundreds of thousands of dollars over a lifetime. For example, a study by the American Heart Association relying on statistics from 2003 found that the average cost of hospitalization *alone* for treatment of hypoplastic left heart was \$199,587, and for treatment of transposition of the great arteries ("TGA") was above \$150,000. (See Am. Heart Ass'n, *Heart Disease and Stroke Statistics: 2010 Update At-A-Glance*, at 19). In other words, even assuming that hospitalization costs had not risen in the last eight years, only 35 claimants alleging defects like hypoplastic left heart or TGA would place UHG's purported class claims and the amount in controversy well over \$5 million.

23. As demonstrated above, UHG's Avandia and Paxil-related claims on behalf of the class will therefore involve an amount above \$5 million.

24. Accordingly, CAFA's amount in controversy requirement is satisfied. See 28 U.S.C. § 1332(d)(2) and (d)(6).

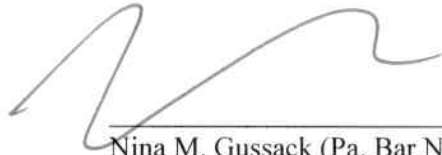
25. Because CAFA confers federal subject matter jurisdiction over this action, removal of this action to this Court is proper pursuant to 28 U.S.C. §§ 1441 and 1453.

III. THIS COURT HAS FEDERAL JURISDICTION UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

26. This Court has exclusive federal jurisdiction over UHG's ERISA claim. 29 U.S.C. § 1132(e)(1).

27. Because ERISA confers exclusive federal jurisdiction over UHG's recovery claim, removal of this action is proper pursuant to 28 U.S.C. §§ 1441 and 1331.

WHEREFORE, for the reasons set forth above, GSK requests that this Court assume full jurisdiction over this action as provided by law.



Nina M. Gussack (Pa. Bar No. 31054)
Anthony C.H. Vale (Pa. Bar No. 28139)
Kenneth H. Zucker (Pa. Bar No. 38418)
PEPPER HAMILTON LLP
3000 Two Logan Square
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Attorneys for Defendant

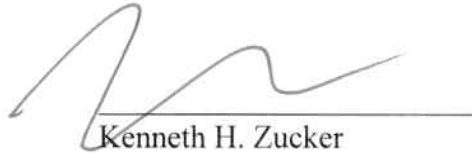
Dated: June 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on June 15, 2011, I served a true and correct copy of the foregoing Notice of Removal upon the following via electronic means and will also be placing a copy in the U.S. Mail, First Class postage prepaid:

Richard W. Cohen, Esq.
Gerald Lawrence, Esq.
Peter D. St. Phillip, Esq.
LOWEY DANNENBERG COHEN & HART, P.C.
Four Tower Bridge
200 Barr Harbor Drive, Suite 400
West Conshohocken, PA 19428

Attorneys for Plaintiff



Kenneth H. Zucker

Exhibit A

Court of Common Pleas of Philadelphia County
Trial Division
Civil Cover Sheet

		For Prothonotary Use Only (Docket Number)	
		DECEMBER 2010	002871
PLAINTIFF'S NAME UNITEDHEALTH GROUP, INC.		E-Filing Number: 1012038381	
PLAINTIFF'S ADDRESS 9900 BREN RD. MINNEAPOLIS MN 55440-1459		DEFENDANT'S NAME GLAXOSMITHKLINE, L.L.C.	
PLAINTIFF'S NAME		DEFENDANT'S ADDRESS ONE FRANKLIN PLAZA PHILADELPHIA PA 19101	
PLAINTIFF'S ADDRESS		DEFENDANT'S NAME GLAXOSMITHKLINE HOLDINGS (AMERICAS) INC.,	
PLAINTIFF'S NAME		DEFENDANT'S ADDRESS ONE FRANKLIN PLAZA PHILADELPHIA PA 19101	
PLAINTIFF'S ADDRESS		DEFENDANT'S NAME	
TOTAL NUMBER OF PLAINTIFFS 1		TOTAL NUMBER OF DEFENDANTS 2	
AMOUNT IN CONTROVERSY <input type="checkbox"/> \$50,000.00 or less <input checked="" type="checkbox"/> More than \$50,000.00		COMMENCEMENT OF ACTION <input type="checkbox"/> Complaint <input type="checkbox"/> Petition Action <input type="checkbox"/> Notice of Appeal <input checked="" type="checkbox"/> Writ of Summons <input type="checkbox"/> Transfer From Other Jurisdictions	
COURT PROGRAMS <input type="checkbox"/> Arbitration <input type="checkbox"/> Mass Tort <input checked="" type="checkbox"/> Commerce <input type="checkbox"/> Settlement <input type="checkbox"/> Jury <input type="checkbox"/> Savings Action <input type="checkbox"/> Minor Court Appeal <input type="checkbox"/> Minors <input type="checkbox"/> Non-Jury <input type="checkbox"/> Petition <input type="checkbox"/> Statutory Appeals <input type="checkbox"/> W/D/Survival <input type="checkbox"/> Other:			
CASE TYPE AND CODE KT - DISPUTE RE: BUSINESS TORT			
STATUTORY BASIS FOR CAUSE OF ACTION			
RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)		IS CASE SUBJECT TO COORDINATION ORDER? YES NO	
		FILED PRO PROTHY DEC 23 2010 M. TIERNEY	
TO THE PROTHONOTARY: Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: <u>UNITEDHEALTH GROUP, INC.</u> Papers may be at the address set forth below.			
NAME OF PLAINTIFF'S/PETITIONER'S/APPELLANT'S ATTORNEY GERALD LAWRENCE, JR.		ADDRESS 200 BARR HARBOR DR SUITE 400 WEST CONSHOHOCKEN PA 19428	
PHONE NUMBER (610) 941-2760	FAX NUMBER (610) 862-9777		
SUPREME COURT IDENTIFICATION NO 69079		E-MAIL ADDRESS glawrence@lowey.com	
SIGNATURE OF FILING ATTORNEY OR PARTY GERALD LAWRENCE, JR.		DATE SUBMITTED Thursday, December 23, 2010, 03:34 pm	

FINAL COPY (Approved by the Prothonotary Clerk)

**COMMERCE PROGRAM ADDENDUM
TO CIVIL COVER SHEET**

This case is subject to the Commerce Program because it is not an arbitration matter and it falls within one or more of the following types (check all applicable):

- ☐ 1. Actions relating to the internal affairs or governance, dissolution or liquidation, rights or obligations between or among owners (shareholders, partners, members), or liability or indemnity of managers (officers, directors, managers, trustees, or members or partners functioning as managers) of business corporations, partnerships, limited partnerships, limited liability companies or partnerships, professional associations, business trusts, joint ventures or other business enterprises, including but not limited to any actions involving interpretation of the rights or obligations under the organic law (e.g., Pa. Business Corporation Law), articles of incorporation, by-laws or agreements governing such enterprises;
- ☒ 2. Disputes between or among two or more business enterprises relating to transactions, business relationships or contracts between or among the business enterprises. Examples of such transactions, relationships and contracts include:
 - ☐ (1) Uniform Commercial Code transactions;
 - ☐ (2) Purchases or sales of business or the assets of businesses;
 - ☒ (3) Sales of goods or services by or to business enterprises;
 - ☐ (4) Non-consumer bank or brokerage accounts, including loan, deposit cash management and investment accounts;
 - ☐ (5) Surety bonds;
 - ☐ (6) Purchases or sales or leases of, or security interests in, commercial, real or personal property; and
 - ☐ (7) Franchisor/franchisee relationships.
- ☐ 3. Actions relating to trade secret or non-compete agreements;
- ☐ 4. "Business torts," such as claims of unfair competition, or interference with contractual relations or prospective contractual relations;
- ☐ 5. Actions relating to intellectual property disputes;
- ☐ 6. Actions relating to securities, or relating to or arising under the Pennsylvania Securities Act;
- ☐ 7. Derivative actions and class actions based on claims otherwise falling within these ten types, and consumer class actions other than personal injury and products liability claims;
- ☐ 8. Actions relating to corporate trust affairs;
- ☐ 9. Declaratory judgment actions brought by insurers, and coverage dispute and bad faith claims brought by insureds, where the dispute arises from a business or commercial insurance policy, such as a Comprehensive General Liability policy;
- ☐ 10. Third-party indemnification claims against insurance companies where the subject insurance policy is a business or commercial policy and where the underlying dispute would otherwise be subject to the Commerce Program, not including claims where the underlying dispute is principally a personal injury claim.

By: GERALD LAWRENCE, Esq.
email: glawrence@lowey.com
Identification No. 69079
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Phone: 610-941-2760

Assessment of Damages Hearing

☐ IS ☒ IS NOT REQUIRED

☐ JURY ☒ NON JURY
for Subrogation and Declaratory Relief

Attorneys for Plaintiff

UNITEDHEALTH GROUP, INC.)
9900 Bren Rd.)
Minneapolis, MN 55440-1459)
individually and on behalf of)
similarly situated health plans,)
Plaintiffs,)
v.)
GLAXOSMITHKLINE, L.L.C., and)
GLAXOSMITHKLINE HOLDINGS)
(AMERICAS) INC.,)
One Franklin Plaza)
Philadelphia, PA 19101)
Defendants.)

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
Trial Division

DECEMBER TERM, 2010

NO.

PRAECIPE TO ISSUE WRIT OF SUMMONS

TO THE PROTHONOTARY:

Kindly issue a Writ of Summons in the above-captioned matter, upon payment of your costs only.

By: /s/ Gerald Lawrence
Richard W. Cohen, Esq. (I.D. No. 55485)
Gerald Lawrence, Esq. (I.D. No. 69079)
Peter D. St. Phillip, Esq. (I.D. No. 70027)
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Attorneys for Plaintiff, UnitedHealth Group, Inc.

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Attorneys for Plaintiff

UNITEDHEALTH GROUP, INC,)	PHILADELPHIA COUNTY
individually and on behalf of)	COURT OF COMMON PLEAS
all others similarly situated,)	Trial Division
)	
Plaintiffs,)	DECEMBER TERM, 2010
)	
v.)	NO.
)	
GLAXOSMITHKLINE, L.L.C.,)	
GLAXOSMITHKLINE HOLDINGS)	
(AMERICAS) INC., JOHN DOE)	
)	
Defendants.)	
)	

PRE-COMPLAINT INTERROGATORIES

Pursuant to Rule 4003.8 of the Pennsylvania Rules of Civil Procedure, Plaintiff UnitedHealth Group, Inc. ("United"), on behalf of itself and similarly situated health plans, serves these Pre-Complaint Interrogatories on Defendants GlaxoSmithKline, L.L.C. and GlaxoSmithKline Holdings (Americas) Inc. (collectively, "GSK"). The Pennsylvania Rules of Civil Procedure allow for pre-complaint discovery "where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party." Pa. R. Civ. P. 4003.8(a). Available discovery under Rule 4003.8 includes, but is not limited to, the Interrogatories served herein. See Pa. R. Civ. P. 4001(c), 4005(a).

UNITED'S CLAIMS

United, like most health insurers and health benefit plan administrators in the United States, provides medical expense coverage to its members under agreements where such members authorize United to pursue claims for subrogation and reimbursement. The right to subrogation, which arises when a tortfeasor causes a plan member to suffer injury requiring medical treatment that was paid for by the plan, allows the plan to stand in the shoes of the member to bring a claim directly against the tortfeasor for the cost of that medical treatment. In addition to this contractual right, many states, including Pennsylvania, recognize an equitable right to subrogation even in the absence of plan language extending that right to a health plan. *See, e.g., Valor v. Pa. Emps. Benefit Trust Fund*, 939 A.2d 312, 319-320 (Pa. 2007). The right to reimbursement, which arises when a member is injured by a tortfeasor and subsequently receives compensation from the tortfeasor for his or her injury, allows the plan to recover its medical expenses directly from the member or others who come into possession of the settlement funds, such as the member's attorney.

GSK is currently defending over 13,000 personal injury and products liability claims brought by current and former users of Avandia, Avandaryl, and Avandamet (collectively, "Avandia"). Avandia is a prescription drug used for the treatment of type-2 diabetes mellitus. Avandia side effects have included a range of adverse health outcomes, including congestive heart failure, strokes, and heart attacks. People who claim to have been injured by Avandia ("Avandia Claimants") include plaintiffs in federal and state courts (including this Court), and others who have signed tolling agreements with GSK. In July 2010, it was widely reported that GSK had settled an unknown number of Avandia-related claims for at least \$460 million. United and other similarly situated health plans have no access to the identities of these settling Avandia Claimants.

GSK is also a named defendant in at least 800 personal injury and products liability suits brought by former users of Paxil, an antidepressant prescription drug and has entered into tolling agreements with an unknown number of people who claim they have been injured by Paxil ("Paxil Claimants"). Paxil side effects have included birth defects in newborns of mothers who were treated with the drug during their first trimester. According to press reports, GSK settled the majority of these cases this year. United and other similarly situated health plans have no access to the identities of these settling Paxil Claimants.

United, on behalf of itself and similarly situated health plans, intends to sue GSK and other defendants, seeking (a) a declaratory judgment regarding the status of health plans' subrogation and reimbursement rights; (b) recovery from GSK in subrogation of their expenses of treating the adverse health outcomes their members experienced associated with Avandia; and (c) reimbursement from their health plan members who were Avandia Claimants or Paxil Claimants and settled their Avandia or Paxil claims. However, it is impossible for United to draft its complaint without knowing the identity of the Avandia Claimants and the Paxil Claimants who have (a) sued GSK; (b) signed tolling agreements with GSK; or (c) settled with GSK. Accordingly, with these two Interrogatories, United seeks to identify these Avandia Claimants and Paxil Claimants, as well as their respective attorneys.

INSTRUCTIONS

The two interrogatories request identification of Paxil Claimants and Avandia Claimants. Please provide answers to these interrogatories in Excel spreadsheets or other searchable electronic format.

DEFINITIONS

"Avandia" includes the drugs Avandia, Avandamet, and Avandaryl.

“Avandia Claimant” includes anyone who has (a) sued GSK in state or federal court alleging that Avandia injured him or her or anyone else whom the plaintiff claims the right to represent with respect to the assertion of Avandia-related injury claim; (b) entered into an agreement with GSK that either tolled or resolved his or her (or the person’s he or she claims the right to represent) Avandia-related claims against GSK.

“GSK” includes GlaxoSmithKline, L.L.C., GlaxoSmithKline Holdings (Americas) Inc., and any of their affiliates and subsidiaries.

“Paxil Claimant” includes anyone who has (a) sued GSK in state or federal court alleging that Paxil injured him or her or anyone else whom the plaintiff claims the right to represent with respect to the assertion of any Paxil-related injury claim; (b) entered into an agreement with GSK that either tolled or resolved his or her (or the person’s he or she claims the right to represent) Paxil-related claims against GSK.

INTERROGATORIES

1. Identify (a) the first name, last name, last known address, social security number and date of birth of all Avandia Claimants and any persons such Avandia Claimants purport to represent, as well as the name of any and all health plans that covered each Avandia Claimant and any persons such Avandia Claimants purport to represent and all member identification numbers assigned by each health plan for each Avandia Claimant and any persons such Avandia Claimants purport to represent; and (b) the first name, last name, firm name, and last known address of these Avandia Claimants’ respective legal counsel.

2. Identify (a) the first name, last name, last known address, social security number and date of birth of all Paxil Claimants and any persons such Paxil Claimants purport to represent, as well as the name of any and all health plans that covered each Paxil Claimant and

any persons such Paxil Claimants purport to represent and all member identification numbers assigned by each health plan for each Paxil Claimant and any persons such Paxil Claimants purport to represent; and (b) the first name, last name, firm name, and last known address of these Paxil Claimants' respective legal counsel.

DATE: December 23, 2010

By: /s/ Gerald Lawrence
Richard W. Cohen, Esq. (I.D. No. 55485)
Gerald Lawrence, Esq. (I.D. No. 69079)
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Attorneys for Plaintiff, UnitedHealth Group, Inc.

Exhibit B

1

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

UNITED HEALTH GROUP, INC.	DECEMBER TERM, 2010
Vs.	
GLAXOSMITHKLINE LLC and GLAXOSMITHKLINE Holdings (Americas) Inc.	NO. 2871

May 16, 2011

City Hall, Courtroom 246
Philadelphia, Pennsylvania

Motion to Compel Discovery

CH-15-112-RM

B E F O R E:

THE HONORABLE MARK I. BERNSTEIN

Maureen McCarthy, RMR, CRCR
Official Court Reporter
215-683-8107
Maureen.mccarthy@courts.phila.gov

2

APPEARANCES:

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United vs. GlaxoSmithKline - 5/16/2011

THE COURT: Who's here for United Health Group?

MR. LAWRENCE: Good morning, Your Honor. Gerald Lawrence for United Health Care.

MR. VALE: Anthony Vale from Pepper, Hamilton and my colleague, Ken Zucker, is with me. David (?) from King and Spalding and James Barger, Aylstock, Witkin. He represents the plaintiff, steering committee in the Avandia litigation; so if Your Honor has any questions on the plaintiff's position on it, they're here.

THE COURT: Fine. I have a note here and I don't know what it means. See if settled. Then it says not settled.

MR. LAWRENCE: I don't believe it's our note.

MR. VALE: There's no current negotiations.

THE COURT: I don't know who wrote that. Mr. Lawrence?

MR. LAWRENCE: This is a Motion to

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United vs. GlaxoSmithKline - 5/16/2011

Compel discovery. I'd like to review the standards for precomplaint discovery, explain why we need them. We discussed this at some length with the defendant so I'd like to anticipate their arguments.

By way of background, we filed this matter as a writ in that December. We promptly served in December a precomplaint discovery.

The basis for this is that my client, United Health Care, is a large health insurance company. The defendants here --

THE COURT: Is this a class action?

MR. LAWRENCE: It is. The defendants, GlaxoSmithKline, among other things, manufacture two drugs, Avandia and Paxil. Both are alleged to be defective and are the subject of a mass tort litigation.

We believe, Your Honor, that our insureds and other persons for whom we pay health care expenses, many of them are claimants in these cases and that we

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United vs. GlaxoSmithKline - 5/16/2011

have a right to recovery of the monies which we have paid for their health care as a result of the alleged negligence of the defendants.

The statutory and case law authority for precomplaint discovery is McNeil versus Jordan. What that case says is that we are required to demonstrate good faith as well as probable cause that the information sought is material and necessary to the filing of the complaint.

In these circumstances, Your Honor, United Health Care and other payers would have potentially four different causes of action to recover for the monies which they spent for the health care of the persons that were harmed by Avandia; the first of which is plaintiff subrogation.

Subrogation, simply put, is the payer, the insurer, standing in the shoes of the victim to recover money that the insurer paid for the health care at issue.

There's contractual subrogation; but

6

United vs. GlaxoSmithKline - 5/16/2011

also in Pennsylvania, statutory subrogation that was established by the Supreme Court in 2007 or 2008 in the PBTF case, it was Vadoya versus the PBTF.

What that case says is that even if there is not a specific contractual right for health plans to seek payment from third sources for its expenses, as an equitable matter in Pennsylvania, under Pennsylvania law, if you've made these expenditures, you have a right to recover from the tort-feasor.

In addition to the subrogation claim, Your Honor, we would have a reimbursement claim. Reimbursement is a similar type claim, although the right of recovery would be to be reimbursed by the insured who's made a recovery from GSK. We also have rights -- I see a puzzled look on Your Honor's face.

We also, we have a right of recovery under the ERISA statute which, in its simplest form to explain that right, there's a United States Supreme Court

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case called Sereboff a few years ago. What Sereboff says is that where you have an ERISA plan who has expended money to cover health care costs on behalf of one of its members, and the member recovers from a third-party and there's a fund of assets available to pay claims to the member, that you have a right under ERISA to make that recovery. ERISA has an effective subrogation claim.

You could say that it doesn't use the word "subrogation" but that's the effect of it.

THE COURT: That's a way of thinking about --

MR. LAWRENCE: Absolutely. That would be consistent with the holding of same.

And the fourth way we think we have a right to recover is to the extent that some of the plans which our client has here are Medicare Plus choice plans which is where a person who's Medicare eligible enrolls in a private plan from United,

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and the Government pays the premium for that plan or the majority of the premium for the plan.

Sometimes individuals pay additional premiums to get a different level of service, but the Government pays essentially for them to be in a private plan rather than Medicare.

Under the Medicare statutes, there's a right to charge, which is a tortfeasor or another person who would be liable for payments to make the recovery.

We have actually filed for another client, for Humana, a case down the street at the Federal courthouse, attempting to recover under the Medicare Secondary Payor Act for those claims which we have paid with respect to Avandia claimants; and we interestingly had a motion to dismiss argument on that case about a week ago, ten days ago; and Mr. Semitis, who's not here but is Mr. Vale's partner and Mr. Zucker, was there during this argument, was asked by the

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2 Court, after he acknowledged that there
3 is a right under the Medicare Act to
4 recover, but that the dispute was whether
5 there's a Federal claim, it should be
6 pursued in Federal Court.

7 The judge, Laughlin, I think,
8 rightfully --

9 THE COURT: It's a Federal statute?
10 It can't be enforced in Federal Court?

11 MR. LAWRENCE: That was the point
12 she's taken; and in fairness, there is
13 some disparity of interpretation of the
14 case law on that; and whether the right
15 to recover is limited only to the Federal
16 government for the standard Medicare Act
17 or whether a client, such as my client,
18 who have these advantage plans will be
19 able to recover.

20 But in response to the judge's
21 question, do they have any recourse in
22 any event to make these chargebacks?
23 Because it's clear under the statute and
24 they concede under the statute there's a
25 right for chargeback. Mr. Semitis said,

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2 yes, they have recourse, Your Honor.
3 We're not here to define the scope of the
4 rights that supported them under the
5 Medicare Advantage Act.

6 There was something there. They are
7 allowed to charge. How far that goes and
8 what that means is for another day; but
9 that right, like any Federal right that
10 is created without a specific Federal
11 remedy can be enforced under state law.

12 The Court followed up. Was this a
13 matter of contract? Mr. Semitis from
14 Pepper said: As a matter of contract or
15 state law with respect to subrogation
16 rights. I mean, there's a lot of common
17 law that, indeed, there was some right
18 afforded a right to charge. We want to
19 see how that plays out and, actually,
20 brought an appropriate forum.

21 I think that all but concedes that
22 we have state law right of action at a
23 minimum for those Medicare claims. I
24 think we have a state law right of action
25 for the other reasons that I've said for

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2 subrogation, both contractual subrogation
3 and the Commonwealth right of equitable
4 subrogation that we're afforded in
5 Pennsylvania.

6 And at an absolute minimum, we've
7 made a showing as required in McNeil
8 versus Jordan that there's probable cause
9 to bring these claims. Under McNeil
10 versus Jordan, we then also have to show
11 the reasonableness, if you will, in
12 discovery that we're seeking.

13 And I think what we're seeking is
14 very narrow. We're asking for the
15 identity of the persons who have either
16 sued the defendants, the persons who have
17 entered into tolling agreements to the
18 statutes; they don't have to bring a
19 claim and, third, the identities of those
20 who actually settled claims with the
21 defendants.

22 The reason that we need that is that
23 in order to bring these subrogation
24 claims or the other claims that we
25 discussed, we have to identify on whose

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2 behalf we're pursuing the claim.

3 Now, we know with respect to a small
4 number of claimants that we were able to
5 identify United States Health Care
6 members who we believe may have filed
7 lawsuits. We can't identify them with
8 certainty because there could be more
9 than one Mark Bernstein in the City of
10 Philadelphia who filed a lawsuit; so we
11 think there's some, but we don't know,
12 and that's really why we need discovery
13 so that we can pursue claims against them
14 to recover these funds.

15 Now, they've raised a number of
16 defenses and objections, as you might
17 think, although I will note, they never
18 responded to the discovery. We served
19 this discovery in December. They removed
20 the case from the 29th day, the day
21 before the discovery response was due at
22 Federal Court on the writ. You look
23 somewhat shocked.

24 THE COURT: There's no requirement
25 to respond to discovery precomplaint.

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I'll call you back as soon as I can.

- - -

(Recess.)

- - -

THE COURT: Mr. Lawrence, I'm not following this. Your client is United Health Group?

MR. LAWRENCE: That's correct.

THE COURT: And your class is United Health Group and similarly situated Health Plans; right?

MR. LAWRENCE: That's correct.

THE COURT: Why do you need the names of any insured? I don't mean insured, any settler.

MR. LAWRENCE: In order to comply with the pleading requirements for the subrogation cases, we need to establish the identity of the person who is our insured who has been a victim of their conduct.

THE COURT: How did you do that in Federal court for Humana?

MR. LAWRENCE: That was one of the

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deficiencies they were attempting to underline with our complaint.

What we were able to do with Humana is similar to what we were able to do with United Health, was to identify by doing some docket matchings persons with particular names; and based upon the identifying information we had that we suspect were persons who had asserted claims in the Humana case, we sent them a list of names, and they refused to confirm or deny whether those persons actually had claims.

THE COURT: Is there a specific class action leading rule that you're referring to?

MR. LAWRENCE: It's not a class action, but it would be the requirements in order plead a claim for subrogation, we would have to identify the person who we claim was injured by their conduct.

THE COURT: Fine. Mr. Vale, do you think they have to plead a person's name in order to correct -- to adequately

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plead an otherwise valid subrogation claim?

MR. VALE: Yes, Your Honor. Maybe I can distinguish two situations; one where they might have.

THE COURT: On what basis can I possibly reject their Interrogatory to get some names, however narrow, if you think they need that to properly file a claim?

MR. VALE: Well, Your Honor, with respect to people who have asserted a claim against GSK and with whom we have settled, Your Honor, they have no subrogation right because the claims already been --

THE COURT: Your hypothetical is different from mine, and if you continue doing that, I will assume that the reason you're doing that is because there is no answer to the question that I'm asking.

If you're saying, as you just said, that in order to properly plead a subrogation claim of any sort, otherwise

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valid, they need names of people, how can I reject their precomplaint discovery asking for the names of people in the category?

MR. VALE: Because, Your Honor, the precomplaint -- they are not entitled to precomplaint discovery in order to obtain this information.

THE COURT: They are entitled to precomplaint discovery in order to get the information they need to file a proper complaint, and you are conceding that they need names in order to file a proper complaint.

So your entire point is there is no cognizable claim. Am I correct or incorrect? I'm hearing you concede that they need names in order to file a complaint, and I guess I'm ignoring that they can get the names from their own database?

MR. VALE: Mr. Lawrence has outlined what he believes are four possible courses of action.

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1 billing codes that are indicative that
2 they're in an accident.

3 We have a right to get the medical
4 records. We're then able to get those
5 medical records and determine they went
6 to the hospital and said they were in the
7 car crash and so on and so forth.

8 Here, the vast majority of the names
9 we seek are people who haven't filed a
10 complaint; so we can't even identify who
11 they are other than to send a letter to
12 all the millions of people that are in
13 our system.

14 With respect to the 50 to 75 that I
15 talked about earlier, in the event that
16 we can reach out and contact them, we can
17 do that and they could choose to comply
18 with us or not to comply with us.

19 But oftentimes, these claims are for
20 activities that took place many, many
21 years before. The persons are no longer
22 in our plans in many instances. We no
23 longer have their current addresses and
24 we are frustrated in our ability to do
25

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1 that.

2 The other thing, somebody can take
3 Avandia while they're in our plan. Let's
4 just make it year 2004. They leave our
5 plan and go on to another plan. By the
6 time they have a cardiac event, they're
7 in somebody else's plan. So for them, we
8 wouldn't have a right of subrogation.

9 But then it works the other way.
10 Somebody who's in our plan in 2007 has a
11 heart attack.

12 THE COURT: Wait a minute. You say
13 individually and on behalf of similarly
14 situated health plans?

15 MR. LAWRENCE: That's correct.

16 THE COURT: You're asking eventually
17 for me or some Federal judge to certify a
18 class of health insurers?

19 MR. LAWRENCE: Eventually, we hope
20 to be able to get to that point. It's a
21 cart before the horse argument.

22 They admit that if they had the
23 names, we can make those claims. They
24 have the names and refuse to give us the
25

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1 names.

2 THE COURT: No. I forced them to
3 admit that, but I posited everything else
4 is good and they don't think anything
5 else is good; right?

6 MR. VALE: I don't want to
7 interrupt, but I do want to address the
8 subrogation point.

9 THE COURT: They're not admitting
10 that. They haven't conceded anything.

11 MR. LAWRENCE: If you read the
12 McNeil versus Jordan case, Your Honor,
13 we're not here on preliminary objections.
14 That's the standard they want to impose
15 on us.

16 They want us to have to win
17 preliminary objections that we have a
18 claim that they won't give us the
19 information to file in order to move
20 forward.

21 THE COURT: Let's look at your
22 Interrogatories. Can we?

23 MR. LAWRENCE: Yes, Your Honor.
24 They're attached to our moving papers, I
25

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1 believe, as Exhibit 1. They're Exhibit
2 A, Your Honor.

3 Your Honor, we explain the claims we
4 want to set forth, which is required in
5 the statute. We actually get to the
6 Interrogatories on page four. There's
7 just two Interrogatories. We ask for
8 first name, last name, last known
9 address.

10 THE COURT: Let me read it.

11 You're asking for the attorneys'
12 information as well; right?

13 MR. VALE: Both, Your Honor, that's
14 correct.

15 THE COURT: And the attorneys'
16 information, to a large extent, can be
17 gotten through a search of the dockets of
18 mass tort and through Judge Ruth's
19 dockets, whatever they are, and are not
20 needed for your complaint. Are they?

21 MR. LAWRENCE: That's correct, not
22 needed for the complaint.

23 THE COURT: The objections to that
24 part of your Interrogatories are
25